# 92-2024

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

FORT WAYNE EDUCATION ASSOCIATION, INC.,
*Petitioner*,
v.
FORT WAYNE COMMUNITY SCHOOLS,
and
UNITED STATES POSTAL SERVICE,
*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the exception to the postal monopoly established by the Private Express Statutes for letters that "relate . . . to the current business of the carrier," 18 U.S.C. § 1694, allows a school district to carry in its inter-school delivery system unstamped letters to the school district's teachers from a union that is recognized pursuant to state law as the exclusive collective bargaining representative for those teachers, when such carriage is necessary for the union to perform effectively its statutory obligations as the exclusive collective bargaining representative.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY AND REGULATORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| 1. The Association's Role as Exclusive Representative | 2 |
| 2. The Agreement's Provision Regarding Use of the School District's Inter-School Delivery System | 4 |
| 3. Disposition in the Courts Below | 8 |
| REASONS FOR GRANTING THE WRIT | 11 |
| I. THE QUESTION LEFT OPEN BY *REGENTS OF THE UNIVERSITY OF CALIFORNIA v. PUBLIC EMPLOYMENT RELATIONS BOARD* | 13 |
| II. THIS COURT'S REASONING IN *PERRY EDUCATION ASSOCIATION v. PERRY LOCAL EDUCATORS' ASSOCIATION* | 15 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES

*CASES* Page

*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) .. 16
*Air Courier Conference of America v. American Postal Workers Union*, 111 S. Ct. 913 (1991) .... 11
*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) ..... *passim*
*Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988) ..... *passim*
*United States v. Erie Railroad Co.*, 235 U.S. 513 (1915) ..... 9, 10, 17

*STATUTES*

28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 1331 ..... 8
28 U.S.C. § 1339 ..... 8
Private Express Statutes
18 U.S.C. §§ 1691-97, 1725 ..... 5
18 U.S.C. § 1694 ..... *passim*
39 U.S.C. §§ 601-06 ..... 5

*MISCELLANEOUS*

Indiana Certified Educational Employee Bargaining Act
Ind. Code §§ 20-7.5-1-1, *et seq.* ..... 2
Ind. Code § 20-7.5-1-2(n) ..... 3
Ind. Code § 20-7.5-1-4 ..... 3
Ind. Code § 20-7.5-1-5(a) ..... 3
United States Postal Service Regulations
39 C.F.R. § 310.3(b) ..... 2

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## PETITION FOR WRIT OF CERTIORARI

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The Fort Wayne Education Association, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 977 F.2d 358 (7th Cir. 1992), and reprinted as Appendix A (1a-22a). The order of the court of appeals denying rehearing is unreported, and reprinted as Appendix B (23a-24a). The opinion of the district court is reported at 742 F. Supp. 1031 (N.D. Ind. 1990), and reprinted as Appendix C (25a-28a). The arbitration award is un-

reported, and reprinted as Appendix D (29a-39a). The clarification of the arbitration award is unreported, and reprinted as Appendix E (40a-41a).

## JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. A timely petition for rehearing was denied on March 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 U.S.C. § 1694 provides, in pertinent part:

> Whoever . . . carries, otherwise than in the mail, any letters or packets, except such as relate . . . to the current business of the carrier . . . shall, except as otherwise provided by law, be fined not more than $50.

The Regulations of the United States Postal Service provide, in pertinent part:

> *Letters of the carrier.* (1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person and the letters must relate to the current business of such person. [39 C.F.R. § 310.3(b) (citation omitted).]

## STATEMENT OF THE CASE

### 1. *The Association's Role as Exclusive Representative*

The Fort Wayne Education Association, Inc. ("Association") has for many years been recognized under the Indiana Certified Educational Employee Bargaining Act, Ind. Code 20-7.5-1-1, *et seq.* ("Act"), as the exclusive collective bargaining representative for the teachers em-

ployed by the Fort Wayne Community Schools ("School District"). Among other things, the Act imposes on the School District and the Association the "mutual obligation" to "bargain collectively" with regard to "salary, wages, hours, and salary and wage-related benefits," and "to execute a written contract incorporating any agreement relating to such matters." Ind. Code § 20-7.5-1-2 (n). In order to resolve disputes that may arise as to the agreements reached, the contract "may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances." Ind. Code § 20-7.5-1-4.

The Act allows the Association to become further involved in the operation of the School District by providing that the parties shall "discuss" a wide variety of educational policy matters, including specifically "working conditions, other than those . . . [made bargainable]; curriculum development and revision; textbook selection; teaching methods; hiring, promotion, demotion, transfer, assignment, and retention of certificated employees . . . student discipline; expulsion or supervision of students; pupil-teacher ratio; [and] class size or budget appropriations." Ind. Code § 20-7.5-1-5(a). The parties "may but shall not be required to . . . enter into a written contract concerning" the above matters. *Id.*

In fulfillment of their statutory obligations, the School District and the Association have entered into a series of collective bargaining agreements, including the 1986-89 Master Agreement ("Agreement"), which is the agreement involved in this case. In addition to requiring the Association to perform the traditional functions of an exclusive collective bargaining representative in regard to contract administration and grievance processing, the Agreement calls for significant joint School District/ Association activity designed to advance the "mutual goal," recognized in the Agreement's Preamble, of "pro-

viding . . . a quality education for the students of the school district." [1]

### 2. *The Agreement's Provision Regarding Use of the School District's Inter-School Delivery System*

In order to facilitate communication among the various buildings in the School District, the School District operates an inter-school delivery system, pursuant to which School District employees pick up letters from and deliver letters to various depositories throughout the District. These letters do not bear United States postage. The use of the inter-school delivery system to carry letters sent by the Association is dealt with in Article III(D) of the Agreement, which provides as follows:

> The Association shall be provided a separate mailbox in each school. *The Association's interschool mail shall be distributed by the Board* [*i.e.*, School District]. The Association's office shall be a regular stop on the Board's regularly scheduled interschool mail delivery system. [Emphasis added.]

Indicative of the fact that the Association's access to the School District's inter-school delivery system is in-

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[1] Specifically, the Agreement provides for the Association to engage in a "mutual exchange of information [with the School District] that will assist in developing accurate and constructive programs for teachers" (Agreement, Art. III(H)), for regular monthly meetings between the Association and the School District because of the jointly "recognized . . . need for regular dialogue and communication" (Art. IX(A)), and for the creation on an as-needed basis of joint Association/School District committees because "[i]t is recognized that there are many areas of concern for both teachers and administrators where a common goal exists and where joint committee study and discussion can be of mutual benefit" (Art. IX(B)). In addition to these as-needed joint committees, several specific joint committees are established by the Agreement: a joint committee on evaluation of teachers (Art. VI(C)); a joint committee to administer the sick leave bank created by the Agreement (Art. XVII(B)(2)); and a joint committee to plan and review in-service teacher training programs (Art. XXVII).

tended to assist the Association in performing its obligations as the exclusive collective bargaining representative, Article III(F) provides that:

> No competing teacher organization shall be allowed to use the interschool mail delivery service or school mailboxes for mailings from its organization to teachers in the bargaining unit.[2]

Until August 1988, the School District complied with Article III(D) of the Agreement. As described by the court below:

> The Association's office was made a regular stop on the School Corporation's route, and for several years the School Corporation carried not only the Association mail addressed to the School Corporation and the School Corporation's letters to the Association, but also the Association's mail to and from the teachers. [App. at 3a.]

On August 18, 1988, the School District notified the Association that it construed this Court's decision in *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988), which had been decided some four months earlier, as prohibiting it from complying with Article III(D) of the Agreement. As of August 29, 1988, the School District refused to use its inter-school delivery system to carry any letters sent by the Association to teachers.

In *Regents*, this Court held that the University of California's delivery of unstamped letters from a union to University employees that the union was attempting to organize would violate the Private Express Statutes, 39 U.S.C. §§ 601-06, 18 U.S.C. §§ 1691-97, 1725. The

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[2] This Court has upheld, against First Amendment challenge, the right of a school district to limit access to its communication facilities, including its inter-school delivery system, to the union that is recognized as the exclusive collective bargaining representative. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). *See infra* pp. 15-19.

Court specifically rejected the union's contention that the carriage in question fell within certain statutory exceptions to the postal monopoly, including of relevance here the "letters-of-the-carrier" exception, which permits the private carriage of letters that "relate . . . to the current business" of the carrier. 18 U.S.C. § 1694.[3]

Because the union in *Regents* was not the exclusive collective bargaining representative for the University's employees, but was instead in an organizing mode, the Association disagreed with the position taken by the School District regarding the application of *Regents* to the present situation. On September 13, 1988, the Association filed a grievance under the Agreement. The School District denied the grievance, and the issue ultimately was submitted to "final and binding" arbitration in accordance with Article VIII(I) of the Agreement.

On July 7, 1989, the arbitrator issued an award, in which the Association's grievance was "sustained in part and denied in part." App. at 39a. Because the arbitrator interpreted Article XXIX(C) of the Agreement to "allow[] the [s]chools to unilaterally modify the Contract" to the extent that it is in violation of federal law, *id.* at 35a, the determinative question before him was whether and to what extent the School District could, after *Regents*, comply with Article III(D) without violating the Private Express Statutes. The arbitrator rejected the School District's contention that *Regents* prohibited use of its inter-school delivery system to carry *any* Association mail, concluding instead that:

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[3] Because this Court in *Regents* referred to the exception in 18 U.S.C. § 1694 as the "letters-of-the-carrier" exception, we use that reference here. The Court appears to have used this phraseology solely for purposes of simplicity in discussion, however, and there is nothing in the Court's decision to suggest that the letters must in some substantive sense "belong to" the carrier to come within the exception. Indeed, the *Regents* Court expressly declined to decide whether the exception embodies such a requirement. 485 U.S. at 597.

> [U]nder the facts of this grievance [4] the letters-of-the-carrier exception . . ., as interpreted in the *Regents* decision, applies to a certain extent to the Schools' carriage of the Association's interschool mail.
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> . . . The Arbitrator finds that subjects such as the administration and enforcement of the collective bargaining agreement, education or education-related workshops, seminars, information and materials, and non-education matters concerning the teachers for which the schools receive benefits relate to the current business of the carrier. However, pursuant to *Regents*, the Arbitrator also finds that Association mail notifying the teachers of Association meetings and workshops does not relate to the current business of the Schools, but is instead the current business of the Association.
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> . . . [T]he Arbitrator believes that the School's unilateral deletion [of the provision regarding use of the inter-school delivery system to carry Association mail] swept with too broad a brush. Under our facts, [the provision] was not wholly in conflict with the Private Express Statute. [App. at 36a, 38a (citation omitted).] [5]

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[4] Noting specifically that:

> *Regents* is distinguishable in two major respects from the matter before the Arbitrator: (1) in *Regents* the Union that was requesting to use the University's internal mail system to carry unstamped letters to University employees was not the exclusive bargaining agent of any of the University's employees, but instead was attempting to organize the University's employees; and (2) in *Regents* no collective bargaining agreement existed between the University and the employees that provided for carriage of the Union's interschool mail. [App. at 36a.]

[5] On August 8, 1989, the arbitrator issued a clarification of award, in which he reiterated his decision that the School District is permitted by the Private Express Statutes—and is therefore

On August 31, 1989, following receipt of the arbitrator's clarification of award, *see supra* note 5, the School District sent a letter to the United States Postal Service ("USPS") indicating its intention to comply with the arbitration award unless the USPS "formally" objected. In response, the USPS, by letter dated September 8, 1989, stated that the delivery of Association letters pursuant to the arbitration award would, in its view, violate the Private Express Statutes, and that the School District would be subject to both criminal penalties and civil remedies. The School District thereupon filed the instant declaratory judgment action against the Association and the USPS, seeking a declaration as to the legality under the Private Express Statutes of using its inter-school delivery system for the carriage required by the arbitration award. The district court had jurisdiction over that action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1339 (postal matters).

### 3. *Disposition in the Courts Below*

In the district court, the School District and the USPS moved for summary judgment, arguing that compliance

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required by Article III(D) of the Agreement—to deliver the following types of Association letters:

1. Letters specifically addressed to the Association, its agents, representatives, and members, from the Schools, its agents and representatives, letters addressed to the Schools, its agents and representatives, from the Association, its agents, representatives, and members, *and letters addressed to Association agents, representatives, and members from the Association, its agents and representatives,* having anything whatsoever to do with (a) administration and enforcement of the collective bargaining agreement, (b) education or education-related workshops, seminars, information and materials, and (c) non-education matters concerning the teachers for which the Schools receive benefits; and

2. Flyers and other such non-specifically addressed materials between any of the entities, their agents, representatives, or members, described in 1 above which relate to 1(a), (b) and (c) above. [App. at 40a-41a (emphasis added).]

with the arbitration award would violate the Private Express Statutes. The Association cross-moved for summary judgment, contending that the selective carriage of Association letters[6] called for by the arbitrator came within the letters-of-the-carrier exception. On August 17, 1990, the district court found in favor of the School District and the USPS, holding that the "arbitrator's judgment permitting the school corporation to carry union correspondence to union members without the payment of postage is . . . contrary to federal law." App. at 27a-28a. The Association appealed to the Court of Appeals for the Seventh Circuit, which affirmed the district court's decision in "*most*" respects. App. at 21a (emphasis in original).

In the court of appeals, the USPS argued that the letters-of-the-carrier exception applied only to those letters which "belong to" the carrier (*i.e.*, were sent by or addressed to the carrier), and that the School District could not, therefore, lawfully deliver letters sent by the Association to teachers, even assuming, *arguendo*, that the subject matter of the letters (*e.g.*, the administration and enforcement of the Agreement and/or the holding of education workshops and seminars) related to the School District's current business.

The court of appeals specifically rejected this argument, noting that the Attorney General's opinion that had been codified by Congress in the letters-of-the-carrier exception, and this Court's decision in *United States v. Erie Railroad Co.*, 235 U.S. 513 (1915), both contemplated that letters could fall within the exception in circumstances where they did not "belong to" the carrier. App. at 18a. The court stated:

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[6] Although the arbitration award distinguishes between "letters" and "[f]lyers and other such non-specifically addressed materials," *see supra* note 5, we use the term "letters" in this Petition to refer to written communications generally.

> The Postal Service [in its regulations] introduces a rigid concept of ownership; the letters must belong to the carrier, not simply be sent on its behalf. . . . [T]he Postal Service's position simply does not recognize the Attorney General's and the Supreme Court's concern that the letters could be sent on behalf of the carrier in furtherance of its participation in a joint venture or other similar arrangement. [App. at 18a-19a.] [7]

The court of appeals nevertheless held that the Association letters at issue fell outside the letters-of-the-carrier exception, because, in the court's view, the letters were not sufficiently related to the School District's "business" to meet the literal terms of the exception. On this point, the Seventh Circuit reasoned as follows:

> Despite the close working relationship, mandated by law, between the School Corporation and the Association, it is not realistic, either as a matter of law or as a matter of fact, to characterize at least most of the business of the Association as the business of the School Corporation-carrier. . . . [M]utually shared, or at least overlapping, interests do not fuse perspectives and make the business of those responsible for running the school system congruous with that of those employed as its teachers. To characterize the School Corporation-carrier and the Association as involved in a joint venture analogous to that of the railroad and telegraph company in *Erie* is to ignore the fundamental nature of the collective bargaining process. The School Corporation and the Association simply do not share the same community of interest, as did the two participants in the *Erie* joint venture. [App. at 20a-21a.] [8]

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[7] The USPS sought rehearing by the Seventh Circuit panel on this point, which was denied. App. at 23a-24a.

[8] The court of appeals held that certain letters sent by one of the several School District/Association joint committees established under the Agreement, *see supra* note 1, might qualify under the letters-of-the-carrier exception, but found that the factual record

In response to the Association's argument that in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), a case involving application of the First Amendment and not the letters-of-the-carrier exception, this Court found union letters of an identical nature to be part of the school district's "official business," the court acknowledged that "*Perry*'s distinction between the correspondence of an exclusive bargaining representative and that of an unrecognized union suggests a principled ground for distinguishing the facts in the present case from those in *Regents*." App. at 11a-12a. But, aside from invoking the maxim that a statement of this Court " 'must be taken in the context in which it is made,' " App. at 11a (quoting *Air Courier Conference v. American Postal Workers Union*, 111 S. Ct. 913, 920 (1991)), the court below made no effort to explain how its conclusion that the Association letters at issue here are not sufficiently "relate[d] to the current business of the" School District, App. at 9a, could be reconciled with this Court's reasoning in *Perry*.

## REASONS FOR GRANTING THE WRIT

The letters-of-the-carrier exception to the Private Express Statutes provides as follows:

> Whoever . . . carries, otherwise than in the mail, any letters or packets, *except such as relate . . . to the current business of the carrier* . . . shall, except as otherwise provided by law, be fined not more than $50. [18 U.S.C. § 1694 (emphasis added).]

The question presented by this case is whether the specific —and limited—types of Association letters that the arbitration award obligates the School District to carry

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was inadequate for it to render a decision concerning such letters. Accordingly, the court below remanded this matter to the district court for factual findings. App. at 22a. No issue as to these letters is presented by this Petition.

through its inter-school delivery system[9] "relate . . . to the current business of the" School District within the meaning of this statutory exception. This question warrants review by this Court for two related, but analytically distinct, reasons:

1. In *Regents,* this Court held that letters from a union to certain employees of the University of California that it was attempting to organize did not relate to the current business of the University within the meaning of the letters-of-the-carrier exception. Although the letters in the present case also are from a union to employees, these letters are not part of a union organizing campaign. They are rather letters that are sent to bargaining unit employees by a union that is recognized under state law as their exclusive collective bargaining representative in implementation of its representational obligations. Whether this distinction provides a sufficient ground for distinguishing the present case from *Regents* is an important question of federal law which has not been, but should be, settled by this Court.

2. This Court, in another context, has distinguished between these two kinds of correspondence, holding in *Perry* that an exclusive collective bargaining representative that sends letters to employees in the bargaining unit in implementation of its representational obligations "participate[s] in the [school district's] official business." 460 U.S. at 53. Although this Court in *Perry* "express[ed] no opinion on whether the mail delivery practices involved . . . comply with the Private Express statutes," 460 U.S. at 39 n.1, the decision

[9] Specifically, letters from the Association to employees in the bargaining unit that it represents "having anything whatsoever to do with (a) administration and enforcement of the collective bargaining agreement, (b) education or education-related workshops, seminars, information and materials, and (c) non-education matters concerning the teachers for which the Schools receive benefits." App. at 38a-39a.

of the court below is in conflict with the reasoning, if not the holding, of this Court in *Perry*.

We elaborate on each of these reasons for granting the writ in turn below.

## I. THE QUESTION LEFT OPEN BY *REGENTS OF THE UNIVERSITY OF CALIFORNIA v. PUBLIC EMPLOYMENT RELATIONS BOARD*

*Regents* arose when, on the basis of the Private Express Statutes, the University of California denied the request of a union to carry unstamped union letters to certain of the University's employees whom the union was attempting to organize. The California Public Employment Relations Board ("PERB") held that the denial violated a California statute which requires employers to grant unions access to their "means of communication." PERB rejected the University's contention that the requested access was contrary to federal law, concluding that the carriage fell within certain statutory exceptions to the monopoly granted to the USPS, including the letters-of-the-carrier exception. The California courts affirmed PERB's decision.

This Court reversed, holding that none of the statutory exceptions applied, and that the University's carriage of the letters in question would, therefore, violate the Private Express Statutes. With regard to the letters-of-the-carrier exception, this Court concluded that it "need not reach" the question of "[w]hether or not [the exception] can be read to include a requirement that the letters be written by or addressed to the carrier," 485 U.S. at 596, despite the fact that both the University and the United States, as *amicus curiae,* argued that the exception applies only to the carrier's own letters. Brief for Appellant Regents of the University of California at 25; Brief for *Amicus Curiae* United States at 20. The Court relied instead on the requirement on "the face of the statute . . . that the letters 'relate' to the 'current business' of the carrier," 485 U.S. at 594.

The union involved in *Regents* was not recognized as the exclusive collective bargaining representative for the University employees with whom it sought to communicate, and the letters at issue "relate[d] to the Union's efforts to organize certain of appellant's employees into a bargaining unit." *Id.* at 594. On *these* facts, this Court held that "[t]he alleged 'business' in this case is not close enough to appellant's affairs to be the natural subject of letters concerning [the University's] 'current business.'" *Id.* at 597. The subject of the letters—*i.e.*, organization of employees—"is a subject in which appellant [University] certainly is interested, but it is also a subject which can be accurately described only as the Union's current business, not appellant's." *Id.* at 594. This fact-specific holding clearly leaves open the question of whether letters from an exclusive collective bargaining representative to employees in the bargaining unit in implementation of the union's representational obligations relate to the "current business" of the employer within the meaning of the letters-of-the-carrier exception to the Private Express Statutes.

In the wake of *Regents*, substantial uncertainty exists concerning the legality of provisions in collective bargaining agreements that require school districts to deliver to teachers letters from unions that are recognized as exclusive collective bargaining representatives. Indeed, it was this uncertainty that prompted the School District to file this declaratory judgment action against the Association and the USPS, seeking a declaration as to whether compliance with the arbitration award would violate the Private Express Statutes. *See supra* pp. 5-8.[10] This uncertainty is particularly problematic, given that both crim-

[10] *See also* arbitration award, in which the arbitrator states that "*Regents* is distinguishable in two major respects [*i.e.*, the union was not recognized as an exclusive collective bargaining representative and there was no collective bargaining agreement in effect] from the matter before [him]." App. at 36a.

inal penalties and civil remedies attach to mail delivery found to be unlawful under the Private Express Statutes. The grant of a writ of certiorari in this case would allow this Court to settle this important question of federal law.

## II. THIS COURT'S REASONING IN *PERRY EDUCATION ASSOCIATION v. PERRY LOCAL EDUCATORS' ASSOCIATION*

Review by this Court also is warranted because the Seventh Circuit's decision is in conflict with this Court's reasoning, if not its holding, in *Perry Education Association*.

In *Perry*, a school district and a union that had been recognized as the exclusive collective bargaining representative for a bargaining unit of its teachers ("PEA") entered into a collective bargaining agreement that contained a provision allowing PEA to use the school district's inter-school delivery system, in its capacity as exclusive representative, to communicate with the employees whom it represented, and denied such use to a minority union ("PLEA"). PLEA asserted that the provision infringed its First Amendment rights, but this Court disagreed. The Court held that because the school district's "internal mail system is not a public forum," the school district could "restrict use to those who participate in the forum's official business," 460 U.S. at 53, and for this reason could open the system solely to the exclusive collective bargaining representative, while closing it to rival unions. In support of its conclusion that the exclusive representative "participate[s] in the [school district's] official business," the Court commented as follows:

> *Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers.* Conversely, PLEA does not have any official responsibility in

> connection with the School District and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 221 (1977).
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> * * * *
>
> We agree that the mail service could be restricted to those with teaching and operational responsibility in the schools. But, by the same token—and upon the same principle—the system was properly opened to PEA, when it, pursuant to law, was designated the collective-bargaining agent for all teachers in the Perry Schools. *PEA thereby assumed an official position in the operational structure of the District's schools,* and obtained a status that carried with it rights and obligations that no other labor organization could share. [460 U.S. at 51-52 & 49 n.9 (emphasis added).]

The court below declined to embrace *Perry*'s reasoning for two reasons: (1) *Perry* was decided in the particular "context" of a legal challenge under the First Amendment and the Court was not dealing with the letters-of-the-carrier exception in the Private Express Statutes, *see supra* p. 11;[11] and (2) in the court's view, a union

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[11] In response to a suggestion by the USPS in its *amicus curiae* brief in *Perry* that the use of the inter-school delivery system would violate the Private Express Statutes, the Court stated that "this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statutes or other Postal Service regulations." 460 U.S. at 39 n.1.

whose interests are not entirely "congruous" with those of a school district cannot be deemed to be engaged in the school district's "business" when communicating with teachers regarding the administration of the parties' collective bargaining agreement, *see supra* p. 10. Neither of these reasons survives scrutiny.

To begin with, this Court's conclusion in *Perry* that the union letters there at issue were related to the school district's "official business" did not derive from a First Amendment analysis, but was bottomed solely on the nature of the collective bargaining relationship between the union and the school district—*i.e.*, the union's status as the exclusive collective bargaining representative for the school district's teachers, which gave the union an "official position in the operational structure of the District's schools." 460 U.S. at 49 n.9. Where, as here, a union and a school district stand in precisely the same posture as their counterparts in *Perry*, there is no meaningful distinction between union activities that relate to a school district's "official business" for purposes of the First Amendment, and union activities that "relate . . . to the current business" of a school district for purposes of the letters-of-the-carrier exception to the Private Express Statutes.[12]

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[12] To be sure, although *Perry* compels the conclusion that union letters carried by a school district in these circumstances relate to the school district's "business" *as that word is commonly understood*, nothing would prevent Congress from defining the word "business" *as used in the letters-of-the-carrier exception* to exclude the private carriage of such union letters. There is, however, absolutely no evidence that Congress intended the word "business" as used in the letters-of-the-carrier exception to have some idiosyncratic meaning. To the contrary, as the court below itself recognized, this Court's decisions in *United States v. Erie Railroad Co.*, *supra*, 235 U.S. 513 and *Regents* confirm that Congress intended that word to have its "ordinary common meaning." App. at 11a; *see also id.* at 12a. Thus, the court of appeals' statement that *Perry* "'must be taken in the context in which it is made'" (quoting

As to the court of appeals' second reason, no one would deny that the interests of a school district and a union in issues of contract administration, though overlapping, are not entirely "congruous." [13] That reality, however, in no way detracts from *Perry*'s conclusion that communications between a union and teachers on such issues relate to the school district's "official business." Indeed, an analogous argument to the contrary was explicitly rejected by the *Perry* Court:

> The Court of Appeals refused to consider PEA's access justified as "official business" because the School District did not "endorse" the content of its communications. We do not see the necessity of such a requirement. PEA has official duties as representative of Perry Township teachers. In its role of communicating information to teachers concerning, for example, the collective-bargaining agreement and the outcome of grievance procedures, PEA neither seeks nor requires the endorsement of school administrators. The very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of its representational duties. The lack of an employer endorsement does not mean that the communications do not pertain to the "official business" of the organization. [460 U.S. at 51 n.10.]

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*Air Courier Conference, supra*, 111 S. Ct. at 920)—though unobjectionable as a general statement of principle—lends no support to the judgment below. To depart from a prior decision of this Court on the ground that it was decided in a different context, there must be something about the change in context that warrants such a departure, and that something is completely absent here.

[13] There is, of course, greater congruity of interests with respect to subjects such as education workshops and seminars sponsored by the contracting parties. The arbitration award requires the School District to carry Association letters on these subjects as well. *See supra* note 5 and accompanying text.

In short, the judgment of the court below simply cannot be squared with the reasoning undergirding this Court's decision in *Perry*.[14]

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[14] Even if the court of appeals had been writing on a clean slate, its judgment could not be sustained. The court below had no difficulty with the USPS's position that the letters-of-the-carrier exception allowed the School District to carry to and from teachers its own letters dealing with administration of the Agreement. The School District may lawfully carry such letters, of course, only if they relate to the School District's "business." But if such letters relate to the School District's "business"—as they plainly do—then letters between the Association and teachers *on the very same subject matter* must also relate to the School District's "business." To illustrate the point, suppose that the School District and the Association wished to notify teachers by letter of an arbitration award involving the interpretation or application of the Agreement. There is no rational basis for concluding that such a letter would relate to the School District's "business" if the letter were authored and sent by the School District itself, but not if it were authored and sent by the Association.

This disparate treatment of letters relating to the same subject matter can be rationalized if and only if the letters-of-the-carrier exception includes a requirement that the letters be sent by or addressed to the carrier. Although in our view the court below properly found that no such requirement can reasonably be read into the Private Express Statutes, *see supra* pp. 9-10, the law on that issue necessarily remains unsettled in light of this Court's unwillingness to decide it in *Regents*, *see* 485 U.S. at 597. The need for definitive resolution of this issue provides yet another reason for this Court to grant *certiorari* in this case. *Cf. supra* pp. 13-15.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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No. 90-3316

FORT WAYNE COMMUNITY SCHOOLS,
*Plaintiff-Appellee,*

v.

FORT WAYNE EDUCATION ASSOCIATION, INC.,
*Defendant-Appellant,*

and

UNITED STATES POSTAL SERVICE,
*Defendant-Appellee.*

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Argued Oct. 29, 1991

Decided Oct. 13, 1992

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James P. Fenton, William Sweet (argued), Barrett & McNagny, Fort Wayne, Ind., for plaintiff-appellee.

Daniel E. Serban, Shambaugh, Kast, Beck & Williams, Fort Wayne, Ind., Deborah C. Malamud, Robert H. Chanin (argued), Bredhoff & Kaiser, Washington, D.C., Richard J. Darko, Richard S. Pitts, Lowe, Gray, Steele & Hoffman, Indianapolis, Ind., for defendant-appellant.

Tina Nommay, Asst. U.S. Atty., Office of the U.S. Atty., Fort Wayne, Ind., Jonathan R. Siegel, Michael J. Singer, Lisa A. Olson, Dept. of Justice, Civil Div., Appel-

late Section, Washington, D.C., William Sweet (argued), Barrett & McNagny, Fort Wayne, Ind., for defendant-appellee.

Before COFFEY and RIPPLE, Circuit Judges, and WISDOM, Senior Circuit Judge.*

RIPPLE, Circuit Judge.

A collective bargaining agreement between the Fort Wayne Community Schools (the School Corporation) and the Fort Wayne Education Association, Inc. (the Association), the exclusive representative of the teachers employed by the School Corporation, provided that the Association could use the School Corporation's inter-school mail delivery system to communicate with the teachers. The School Corporation brought a declaratory judgment action naming the Association and the United States Postal Service (Postal Service) as defendants in order to determine whether its carriage of the Association's letters to the teachers violated 18 U.S.C. § 1694.[1] The district court held that it did, and the Association appeals. For the reasons set forth in this opinion, we affirm in part and vacate and remand in part.

## I

## BACKGROUND

### A. *Facts*

The Fort Wayne Education Association is the exclusive bargaining representative of the teachers in the Fort Wayne Community Schools. The collective bargain-

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

[1] Section 1694 is one of a group of statutes known as the Private Express Statutes, codified at 18 U.S.C. §§ 1693-99 and 39 U.S.C. §§ 601-606.

ing agreement between the Association and the School Corporation provided that the Association "shall be provided a separate mailbox in each school. The [Association]'s interschool mail shall be distributed by the Board. The [Association]'s office shall be a regular stop on the Board's regularly scheduled interschool mail delivery system." R. 58, Ex. 1 at 8. The agreement also provided that no competing teacher organization was to be allowed to use the interschool mail delivery service or school mailboxes.

The Association's office was made a regular stop on the School Corporation's route, and for several years the School Corporation carried not only Association mail addressed to the School Corporation and the School Corporation's letters to the Association, but also the Association's mail to and from the teachers. However, after it learned of the Supreme Court's decision in *Regents of the University of California v. Public Employment Relations Board,* 485 U.S. 589, 108 S.Ct. 1404, 99 L.Ed.2d 664 (1988), the School Corporation notified the Association that its carriage of Association correspondence without the payment of postage might violate federal statutes prohibiting private postal service (the Private Express Statutes). The School Corporation continued to deliver its own mail to the Association's office, but stopped carrying the Association's mail. The Association filed a grievance, and the grievance was submitted to binding arbitration. The arbitrator held that delivery of the following kinds of Association correspondence was permissible under the Private Express Statutes and directed the School Corporation to resume delivery of them:

> 1. Letters specifically addressed to the Association, its agents, representatives, and members, from the Schools, its agents and representatives, letters addressed to the Schools, its agents and representatives, from the Association, its agents, representatives, and

members, and letters addressed to Association agents, representatives, and members from the Association, its agents and representatives, having anything whatsoever to do with (a) administration and enforcement of the collective bargaining agreement, (b) education or education-related workshops, seminars, information and materials, and (c) non-education matters concerning the teachers for which the Schools receive benefits; and

2. Flyers and other such non-specifically addressed materials between any of the entities, their agents, representatives, or members, described in 1 above which relate to 1(a), (b) and (c) above.

R. 57. Impermissible under the arbitrator's award is the carriage by the School Corporation of Association correspondence concerning only the business of the Association, such as letters or flyers "notifying the teachers of Association meetings and workshops." R. 2, Ex. A.

The School Corporation informed the Postal Service of the arbitrator's determination. The Postal Service then formally notified the School Corporation that delivery without payment of postage of much of the Association correspondence specified in the arbitrator's award would violate federal criminal law and would subject the School Corporation, the Association and persons acting in their behalf to criminal and civil penalties. The School Corporation then brought suit against the Association and the Postal Service for declaratory judgment, asking the court to determine which Association mail, if any, it might lawfully carry. All parties moved for summary judgment. Although the Postal Service was joined as a defendant, its motion for summary judgment was brought as a cross claim against the Association.

B. *District Court Proceedings*

The District Court determined that, under *Regents,* the School Corporation was prohibited from carrying the Association's mail. *Regents* dealt with correspondence addressed to university faculty from a union that was attempting to organize the faculty into a collective bargaining unit, rather than, as is the case here, mail to teachers from a union that was their exclusive bargaining representative. However, the district court held that this distinction was of no significance for the purposes of the Private Express Statutes. Characterizing the correspondence at issue as Association correspondence to teachers, not in their capacity as employees of the School Corporation, but in their "capacity as dues-paying members of the local teachers union," the district court found that the correspondence did not relate to the current business of the School Corporation and that therefore the "letters of the carrier" exception to the Private Express Statutes did not apply. 742 F.Supp. 1031, 1033 (N.D.Ind. 1990). Accordingly, the district court held that the School Corporation's carriage of the Association's mail was contrary to federal law, and granted summary judgment to the Postal Service and the School Corporation.

II

ANALYSIS

A. *Standard of Review*

We review de novo a district court's grant or denial of summary judgment. *Hayes v. Otis Elevator Co.*, 946 F.2d 1272, 1277 (7th Cir.1991); *Campbell v. White,* 916 F.2d 421, 422 (7th Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 1314, 113 L.Ed.2d 248 (1991). The party moving for summary judgment bears the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.

Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

B. *Merits*

In the present case, the underlying facts are not in dispute; the issues presented for our review in this case are primarily legal.

1.

We first turn to an examination of the statute at issue. The "letters of the carrier" exception to the federal government's monopoly on postal services is contained in 18 U.S.C. § 1694:

> Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than $50.

Chief Justice Rehnquist elaborated on the reason for this statute and its companion sections, known collectively as the Private Express Statutes, in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 111 S.Ct. 913, 915, 112 L.Ed.2d 1125 (1991):

> The monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission. *See Regents of University of California v. Public Employment Relations Board*, 485 U.S. 589, 598, 108 S.Ct. 1404, 1410, 99 L.Ed.2d 664 (1988). It prevents private competitors from offering service on low-cost routes at

prices below those of the postal service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and service to patrons in all areas, including those that are remote or less populated.

He further noted:

The legislative history of the sections of the Act limiting private carriage of letters shows a two-fold purpose. First, the Postmaster General and the States most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market intelligence and news of international affairs that had not yet reached the general populace through the slower mails. S.Doc. No. 66, 28th Cong., 2d Sess., 3-4 (1845). Second, it was thought to be the duty of the Government to serve outlying, frontier areas, even if it meant doing so below cost. H.R.Rep. No. 477, *supra,* at 2-3. Thus, the revenue protection provisions were not seen as an end in themselves, nor in any sense as a means of insuring certain levels of public employment, but rather were seen as the means to achieve national integration and to ensure that all areas of the Nation were equally served by the Postal Service.

The Private Express Statutes enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. If competitiors could serve the lower cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business, thereby increasing its average unit cost and requiring higher prices to all users. *See*

> Report of the President's Commission on Postal Organization, Towards Postal Excellence, 94th Cong., 2d Sess., 129 (Comm.Print 1968) (footnote omitted). The postal monopoly, therefore exists to ensure that postal services will be provided to the citizenry at-large . . . .

*Id.* 498 U.S. at ——, ——, 111 S.Ct. at 919-20.

The Supreme Court has twice dealt directly with the application of the "letters of the carrier" exception. In *United States v. Erie Railroad Co.*, 235 U.S. 513, 35 S.Ct. 193, 59 L.Ed. 335 (1915), the Court considered letters, carried by a railroad, which related to the railroad's joint operation with Western Union of telegraph lines over the right of way of the railroad company. Before the agreement, the railroad had operated a telegraph line for its own use, and under the agreement Western Union was required to maintain a line for railroad use. Under the contract between the railroad and Western Union, the railroad was required at its own expense to furnish office room, light and heat for telegraph service and to provide an operator and other employees to act as agents for the telegraph company in receiving, transmitting, and delivering telegrams. A "joint superintendent" of the telegraph operations was appointed whose salary was paid half by the railroad and half by Western Union. The contract provided that the joint superintendent and the operator and other employees were "deemed to be the servants of the telegraph company, except when engaged in the transmission of messages for the railroad company and in certain construction work." *Erie,* 235 U.S. at 519-20, 35 S.Ct. at 195. The letters at issue were letters from the joint superintendent to one of the employees provided by the railroad to operate the telegraph office at one of the railroad's stations; the letters concerned the telegraph operations. The Court concluded that, although

> it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is current.

*Id.* at 520, 35 S.Ct. at 195.

The Court again addressed the "letters of the carrier" exception in *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 108 S.Ct. 1404, 99 L.Ed.2d 664 (1988). In *Regents*, officials of the University of California had refused to carry mail from a union to certain employees of the university. The union was attempting to organize the employees. The Court concluded that the union's letters did not relate to the current business of the university:

> The ordinary sweep of the term ["current business"], however, falls far short of encompassing the letters involved in this case. The letters relate to the Union's efforts to organize certain of appellant's employees into a bargaining unit. This is a subject in which appellant certainly is interested, but it is also a subject which can be accurately described only as the Union's current business, not appellant's.

*Regents*, 485 U.S. at 594, 108 S.Ct. at 1409. The Court rejected the union's argument that California's Higher Education Employer-Employee Relations Act, by requiring universities to give unions access to their "means of communication" and by announcing California's "fundamental interest in the development of harmonious and cooperative labor relations," transformed the union's attempts to organize the university's employees into the university's business. Because the Court found that the

letters did not relate to the current business of the carrier, it did not reach the question of whether section 1694 could be read "to include a requirement that the letters be written by or addressed to the carrier." *Id.* at 597, 108 S.Ct. at 1410.

The letters in the present case are also letters from a union to teachers. These letters, however, are not part of a union's campaign to organize a bargaining unit; they are letters from a recognized exclusive representative to employees in the bargaining unit, union members and non-members alike. The Supreme Court, in another context, has distinguished these two kinds of correspondence. In *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Supreme Court considered the question of union access to an Indiana interschool mail system. In that case, a collective bargaining agreement between a school system and the teachers' exclusive bargaining representative gave the exclusive representative access to the interschool mail system, but forbad access to rival unions. A rival union brought suit against the exclusive representative and members of the school board, claiming that the denial of access to the mail system violated the First Amendment. In holding that there was no First Amendment violation, the Court had occasion to examine and distinguish correspondence between an exclusive representative and the teachers in the bargaining unit and correspondence to the teachers from a rival union. The Court noted that, when it was designated the exclusive bargaining agent, PEA "assumed an official position in the operational structure of the District's schools." *Perry,* 460 U.S. at 50 n. 9, 103 S.Ct. at 957 n. 9. The Court rejected the suggestion that, because the Perry School District did not control the content, correspondence to the teachers from the exclusive representative did not "pertain to the 'official business' " of the schools. *Id.* at 51 n. 10, 103 S.Ct. at 958 n. 10. Thus, the denial of access to the rival

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union, while allowing access to the exclusive representative, was a permissible restriction of use "to those who participate in the forum's official business." *Id.* at 53, 103 S.Ct. at 959.

The Postal Service submits that *Perry*'s characterization of the correspondence from the exclusive representative to teachers as "pertain[ing] to official business" is irrelevant to the case at hand and that correspondence that pertains to official business for First Amendment purposes is not necessarily "current business" for the purposes of the Private Express Statutes. It justifiably reminds us that the Supreme Court has cautioned that a statement in its opinions "must be taken in the context in which it is made." *Air Courier Conference,* 498 U.S. at ——, 111 S.Ct. at 920. It then emphasizes that, in *Perry,* the Supreme Court specifically refused to consider whether the carriage of the union's correspondence violated the Private Express Statutes.[2] Yet, neither *Erie* nor *Regents* suggests that the term "current business" should be given other than its "ordinary common meaning." *See Erie,* 235 U.S. at 520-22, 35 S.Ct. at 195-96; *Regents,* 485 U.S. at 594-95, 108 S.Ct. at 1409; *see also United States v. Bell,* 936 F.2d 337, 342 (7th Cir.1991) ("It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."). Thus, while *Perry* certainly does not dictate

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[2] *See Perry,* 460 U.S. at 39 n. 1, 103 S.Ct. at 951-52 n. 1;

> The United States Postal Service, in a submission as *amicus curiae,* suggests that the interschool delivery of material to teachers at various schools in the District violates the Private Express statutes, 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606, which generally prohibit the carriage of letters over postal routes without payment of postage. We agree with the Postal Service that this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statutes or other Postal Service regulations.

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that we consider the correspondence of the Association as the current business of the School Corporation we cannot ignore the reality that *Perry*'s distinction between the correspondence of an exclusive bargaining representative and that of an unrecognized union suggests a principled ground for distinguishing the facts in the present case from those in *Regents*. *Regents* decided that the university's current business did not, in "the ordinary sweep of the term," encompass letters from a union attempting to organize its employees. *Regents*, 485 U.S. at 595, 108 S.Ct. at 1409. At a minimum, *Perry* counsels against too hasty a determination that *Regents* controls the outcome here.

2.

We turn to an examination, in some detail, of the relationship between the School Corporation and the Association. At the outset, it must be emphasized that, as exclusive bargaining representative, the Association represents not just its members, but all the teachers in the bargaining unit.

This relationship between the Association, as exclusive representative, and the School Corporation is governed by Indiana statute. Ind.Code Ann. § 20-7.5-1-1 to § 20-7.5-1-14. Indiana law recognizes that the relationship between school systems ("school corporation employers") and teachers and other professionals in education ("certificated school employees")

> is not comparable to the relation between private employers and employees among others for the following reasons: (i) a public school corporation is not operated for profit but to insure the citizens of the State rights guaranteed them by the Indiana State Constitution; (ii) the obligation to educate children and the methods by which such education is effected will change rapidly with increasing technology, the needs of an advancing civilization and the requirements for substantial educational innova-

> tion; (iii) the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away; and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees.

Ind.Code Ann. § 20-7.5-1-1(d). Recognizing the special employer/employee relationship between teachers and schools, Indiana law defines a special role for a union which has been recognized as the exclusive representative of an appropriate unit of teachers pursuant to section 20-7.5-1-10 of the Indiana Code. Strikes are forbidden. Ind. Code § 20-7.5-1-14. A school corporation not only has a duty to bargain collectively with the exclusive representative over the terms and conditions of employment,[3] but must also "discuss" "curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations." Ind.Code § 20-7.5-1-5(a). The statute defines "discuss" as meaning "the performance of the mutual obligation of the school corporation through its superintendent and the exclusive representative to meet at reasonable times to discuss, to provide meaningful input, to exchange points of view, with respect to items enumerated in Section 5 of this chapter." Ind.Code § 20-7.5-1-2(*o*). If a school corporation forms a committee which is the "sole instrumentality in the drafting and proposal

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[3] Subjects of bargaining are "salary, wages, hours, and salary and wage related fringe benefits." Ind.Code Ann. § 20-7.5-1-4. "A contract may also contain a grievance procedure culminating in final and binding arbitrations of unresolved grievances." *Id.*

of a discussable matter," the exclusive representative of the teachers may not be excluded from the committee. *Evansville-Vanderburgh School Corporation v. Roberts*, 273 Ind. 449, 405 N.E.2d 895, 902 (1980). It is also noteworthy that the collective bargaining agreement between the School Corporation and the Association establishes joint committees to administer excess sick leave and to deal with matters of teacher evaluation and in-service training.

3.

The Postal Service submits two interrelated reasons as to why we ought not consider the Association's communications, as described in the arbitrator's decision, as constituting the current business of the School Corporation-carrier. First, it notes that the correspondence does not qualify for the exemption under postal regulations. Secondly, it submits that, in any event, the correspondence does not relate to the current business of the school corporation.

a.

In order to enforce the statutory exception, the Postal Service has promulgated the following regulation:

> The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

6239 C.F.R. § 310.3(b)(1).

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844,

104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990). That delegation is found in section 401(2) of Title 39. There, Congress gave the Postal Service power "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title." Because the Private Express Statute at issue is codified under Title 18, not Title 39, the Association contends that it is not part of the statutory scheme that the Postal Service is entrusted to administer, but rather a criminal statute to be administered by the courts. This argument was rejected by the District of Columbia Circuit, which concluded that the rulemaking authority granted to the Postal Service by section 401(2) extended to the Private Express Statutes codified under Title 18:

> Appellant asserts that promulgation of these regulations, which have the effect of defining the federal crime of transporting letters outside the mails, was beyond the authority of the Postal Service. We disagree. As the District Court observed, the Service is authorized under 39 U.S.C. § 401(2) (1976) to promulgate regulations to further the objectives of Title 39, which includes provisions concerning the postal monopoly. While 18 U.S.C. § 1969—the private express provision at issue here—is not a part of Title 39, its purpose is intimately connected to that title, and it was only separated from the private express sections in 1909 when the United States criminal laws were codified into Title 18. Accordingly, a fair reading of the rule-making authority of 39 U.S.C. § 4012 is that it extends to § 1969.

*Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n. 5 (D.C.Cir.) (upholding regulation defining "letter"), *cert. denied*, 444 U.S. 837,

100 S.Ct. 73, 62 L.Ed.2d 48 (1979).[4] As we have noted previously, the postal monopoly established by the Private Express Statutes, 18 U.S.C. §§ 1693-99 and 39 U.S.C. §§ 601-606, "was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission." *Air Courier Conference*, 498 U.S. at ——, 111 S.Ct. at 915. The Postal Service's regulations elucidating the Private Express Statutes are aimed at "accomplish[ing] the objectives" of Title 39 and are within the scope of the rulemaking authority delegated to the Postal Service. *See Regents*, 485 U.S. 589, 603, 108 S.Ct. 1404, 1413 (White, J., concurring).

Because the Private Express Statutes are part of a statutory scheme that the Postal Service is entrusted to administer, we must examine the validity of regulations promulgated by the Postal Service to interpret those statutes under the methodology set forth in *Chevron*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Ransom v. Bowen*, 844 F.2d 1326, 1332-33 (7th Cir.), *cert. denied*, 488 U.S. 969, 109 S.Ct. 499, 102 L.Ed.2d 535 (1988). "We begin by examining the language of the statute itself. If it is unambiguous, 'our inquiry is at an end; the congressional intent embodied in that plain wording must be enforced.' " *I.C.C. v. Mr. B's Services, Ltd.*, 934 F.2d 117, 120 (7th Cir. 1991) (quoting *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir.1990)).

In its brief, the Postal Service argues convincingly that the regulatory interpretation of the statute is necessary in order to fulfill the legislative design of the Congress in enacting this exception to the Private Express Statutes. The Postal Service first notes, and we agree,

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[4] *Cf. National Rifle Ass'n v. Brady*, 914 F.2d 475, 479-80 n. 3 (4th Cir.1990) (rejecting argument that agency's power to promulgate regulations was limited by fact that the gun control statute is a criminal statute), *cert. denied*, —— U.S. ——, 111 S.Ct. 1580, 113 L.Ed.2d 645 (1991).

that the statutory text is ambiguous because it leaves undefined the terms "relate" and "current business." If the inquiry were limited to the text alone, the exception "could conceivably be so broad as to permit carriage of any letter concerning a *topic* in which the carrier is interested for business reasons." Postal Service Br. at 14 (emphasis supplied). On the other hand, the text could mean that "the *letter* must be part of the business." *Id.* at 15. Because the statute is ambiguous, the Postal Service is well within its prerogatives in attempting to resolve the ambiguity by regulation. "An administrative agency has discretion to interpret a statute that is not crystal clear." *Mr. B's Services,* 934 F.2d at 121 (quoting *Board of Trade v. S.E.C.,* 923 F.2d 1270, 1273 (7th Cir.1991)).

Nevertheless, a *regulation* which is inconsistent with a statute as construed by the Supreme Court is invalid. *See Maislin Indus., U.S. v. Primary Steel, Inc.,* 497 U.S. 116, 131, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."). Also invalid is an agency's *interpretation* of a regulation which is inconsistent with a statute as construed by the Supreme Court. *See I.C.C. v. Transcon Lines,* 968 F.2d 798 (9th Cir.1992) (invalidating ICC's interpretation of regulations to allow result contrary to Supreme Court construction of statute).

b.

In examining the regulation under this deferential standard, we find in the Postal Service's submission much with which we can agree. At the outset, we agree that the Postal Service is on solid ground in defining the statutory exemption by specifying the possible senders and the recipients. The Postal Service correctly notes that

the legislative intent of Congress is starkly set forth in the legislative history of the statute. As Justice O'Connor pointedly noted in *Regents*, "[t]his history suggests an intention to codify the Attorney General's 1886 construction. That construction includes a requirement that the letters be 'sent by or addressed to the company, or on its behalf,' to qualify for the letters-of-the-carrier exception." *Regents*, 485 U.S. at 596, 108 S.Ct. at 1410 (quoting 21 Op.Atty.Gen. at 400).

It is at this point that the Postal Service's submission becomes somewhat contradictory. The Postal Service emphasizes that the intent of the Congress was to mirror *exactly* the intent of the Attorney General. It is clear, as the Postal Service admits, that the Attorney General was of the view that Congress "evidently had no thought of interfering with the private methods of carriers on post routes for communicating directly with their own employees or with other persons." Appellee's Br. at 19 (quoting 21 Op.Atty.Gen. at 398-99). And, as Justice O'Connor specifically confirmed in *Regents,* 485 U.S. at 596, 108 S.Ct. at 1410, the business of a corporation, even under the "narrow view" adopted by the Court in *Erie,* can include the "efficient and successful operation" of a joint operation, *Erie,* 235 U.S. at 520, 35 S.Ct. at 195. Yet, inexplicably, the Postal Service deviates, both in textual language and in rationale, from the statement of the Attorney General and from the interpretive holdings of the Supreme Court. Textually, the departure is subtle but significant. While, as the Postal Service notes in its brief, the Attorney General believed the statute required that the letter be "sent or addressed to the carry company, *or on its behalf,*" 21 Op.Atty.Gen. at 400, the regulation omits the italicized language. Appellee's Br. at 19. In rationale, the deviation is more pronounced and the contradiction more evident. The Postal Service introduces a rigid concept of ownership; the letters must belong to the carrier, not simply be sent on its behalf. Moreover, the Postal Service's position simply does not

recognize the Attorney General's and the Supreme Court's concern that the letters could be sent on behalf of the carrier in furtherance of its participation in a joint venture or other similar arrangement.

The regulation correctly notes that the carrier's own letter, or one sent to it, are exempt from the strictures of the statute. However, the regulation omits the possibility that the letter might be "on behalf of" the carrier. We cannot rest our decision on an interpretation of a regulation that narrows a statute beyond the interpretation given it by the Supreme Court. *See Maislin Indus.*, 497 U.S. at 131, 110 S.Ct. at 2768. Therefore, as we examine whether the correspondence in question is related to the business of the carrier, we must, in conformity with the mandates of *Erie* and *Regents*, consider that possibility as well.

c.

As we understand the Association's position,[5] it does not argue that the Private Express Statutes permit the School Corporation to carry letters which relate purely to the Association's business. Such letters, it concedes, do not relate to the current business of the schools. Nor would such letters be addressed to the teachers in their capacity as employees, but rather in their capacity as union members. However, letters that deal with the administration of the collective bargaining agreement are more problematic. Such letters must be sent by the Association to *all* School Corporation employees in the bargaining unit. An employee's status with respect to union membership is immaterial. The Association communicates with the teachers not because they are union members but because they are employees of the School Corporation. The Postal Service and the district court give far too little heed to this analytical distinction. The Postal Service is quite correct in suggesting that a state law may not define the work of a state government entity so vaguely and so broadly as to render meaningless

[5] *See* Appellant's Br. at 17, 35.

the Private Express Statutes. *See Regents,* 485 U.S. at 595, 108 S.Ct. at 1409 (rejecting the argument that a general state policy of promoting harmonious labor relations permitted a state university to consider the communications of a union attempting to organize its workers as university business). By contrast, Indiana state law imposes specific mutual obligations on a school district and the particular union that is operating as the exclusive bargaining agent for a school district's employees. To argue, as the Postal Service explicitly does, that the Association occupies the same status as "a vendor with whom the School District has contracted for the provision of school supplies," Appellee's Br. at 29, is to misstate significantly the nature of the relationship created by Indiana law and to misapprehend substantially the nature of the collective bargaining process in the public sector at the state level when an exclusive bargaining agent is involved.

Nevertheless, despite the *partial* infirmity of its regulation, as presently written, and despite its unrealistic characterization of public sector labor relations in Indiana, there is much in the Postal Service's conclusions with which we must agree. Despite the close working relationship, mandated by law, between the School Corporation and the Association, it is not realistic, either as a matter of law or as a matter of fact, to characterize at least most of the business of the Association as the business of the School Corporation-carrier. As a general proposition, the School Corporation's business is to operate the schools; the Association's business is to ensure that the interests of the employees, union and nonunion members alike, are adequately considered when operational decisions are made. Because of the professional character of the employees, their interests transcend the usual individual-centered interests in such matters as wages, hours, and working conditions. However, mutually shared, or at least overlapping, interests do not fuse perspectives and make the business of those respon-

sible for running the school system congruous with that of those employed as its teachers. To characterize the School Corporation-carrier and the Association as involved in a joint venture analogous to that of the railroad and telegraph company in *Erie* is to ignore the fundamental nature of the collective bargaining process. The School Corporation and the Association simply do not share the same community of interest, as did the two participants in the *Erie* joint venture.

Therefore, *most* of the communications at issue cannot be considered those of the School Corporation-carrier. Nor can *most* be considered in any manner to be sent "on behalf of" the Corporation-carrier. They are sent by the Association, an entity that had a distinct, independent and at times adversarial role to that of the School Corporation-carrier. Nor can it be argued that the employees, as recipients or senders of mail from or to the Association, are acting as employees of the Corporation. While they are employees of the Corporation and are recipients or senders of the correspondence in question because of that status, they cannot be said to act *as agents* of the Corporation when communicating with *their* collective bargaining representative.

d.

One ambiguity remains. While we believe it is clear that *most*—indeed the vast majority—of the communications at issue are *not* letters of or on behalf of the School Corporation, we notice that the collective bargaining agreement sets up certain joint committees to administer programs such as excess sick leave.[6] We cannot on the record before us determine whether communications,

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[6] For example, a joint committee plans and approves in-service training and approves credits received by teachers for it. R. 58, Ex. 1 at 101. Another joint committee administers a "sick leave bank" and considers requests for additional days of sick leave. *Id.* at 56.

if any, from these joint committees with respect to the *administration* of a plan rather than bargaining over it, are so closely sponsored by the School Corporation as to be characterized as its correspondence or as sent on its behalf. This limited issue requires further development of the record in the district court.

## Conclusion

Application of regulatory schemes written in another era of our Nation's history presents special problems. The Postal Service has changed greatly since the enactment of the Private Express Statutes, and modern public sector collective bargaining statutes create legal relationships unknown in that earlier era. Accommodation of competing interests is essentially the task of the legislature and the regulating agency, not a judicial one. Accordingly, the judgment of the district court is affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion. The Postal Service may recover its costs in this court.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 22, 1993.

Before

HON. JOHN L. COFFEY, Circuit Judge

HON. KENNETH F. RIPPLE, Circuit Judge

HON. JOHN MINOR WISDOM, Senior Circuit Judge*

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No. 90-3316

FORT WAYNE COMMUNITY SCHOOLS,
*Plaintiff-Appellee,*

v.

FORT WAYNE EDUCATION ASSOCIATION, INC.,
*Defendant-Appellant,*

and

UNITED STATES POSTAL SERVICE,
*Defendant-Appellee.*

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Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division

No. 89 C 205—Allen Sharp, Chief Judge

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

## ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by federal defendant-appellee on November 25, 1992, the judges on the panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

**APPENDIX C**

UNITED STATES DISTRICT COURT
N.D. INDIANA
FORT WAYNE DIVISION

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Civ. No. F 89-205

FORT WAYNE COMMUNITY SCHOOLS,
*Plaintiffs,*

v.

FORT WAYNE EDUCATION ASSOCIATION;
and United States Postal Service,
*Defendants.*

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Aug. 17, 1990

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James P. Fenton, Barrett & McNagny, Daniel E. Serban, Shambaugh, Kast, Beck & Williams, Fort Wayne, Ind., for plaintiff.

Richard J. Darko, Indianapolis, Ind., Lisa A. Olson, U.S. Dept. of Justice, Civ. Div., Washington, D.C., Tina Nommay, Office of U.S. Atty., Fort Wayne, Ind., for defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

ALLEN SHARP, Chief Judge.

The undisputed factual background for this cause is set forth in the court's Order on Motions to Dismiss and to Abstain from Exercising Jurisdiction, published at 735 F.Supp. 907 (N.D.Ind.1990).

The single issue presented here is the legal question whether the Private Express Statutes,[1] recently interpreted by the Supreme Court in *Regents of the University of California v. Public Employment Relations Board (Regents)*, 485 U.S. 589, 108 S.Ct. 1404, 99 L.Ed.2d 664 (1988), prohibit the Fort Wayne Community Schools from carrying Fort Wayne Education Association correspondence to union membership—pursuant to the parties' collective bargaining agreement—without the payment of postage to the Postal Service.

All parties to this litigation acknowledge, as they must, that the general prohibition of the Private Express Statutes applies to the carriage of correspondence involved here. The question is whether such carriage falls within one of the exceptions to the Statutes. Only the "letters-of-the-carrier" exception is relevant here.

The "letters-of-the-carrier" exception appears at 18 U.S.C. § 1694 and provides:

> Whoever . . . carries, otherwise than in the mail, any letters or packets, *except such as relate . . . to the current business of the carrier* . . . shall, except as otherwise provided by law, be fined not more than $50 (emphasis added).

The Supreme Court in *Regents* noted that without this exception no private entity could operate an internal mail system at all. *Regents*, 485 U.S. at 594, 108 S.Ct. at 1408. The Court found this exception a narrow one, limited to letters that qualify as "business of the carrier," *id.* at 597, 108 S.Ct. at 1410, but declined to elaborate upon precisely what constitutes the carrier's current busi-

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[1] Congress enacted the Private Express Statutes, 18 U.S.C. §§ 1693-1699, 39 U.S.C. §§ 601-606, pursuant to its constitutional authority to establish "Post Offices and Post Roads." U.S. Const., Art. I, § 8, cl. 7. "These statutes establish the postal monopoly and generally prohibit carriage of letters over postal routes without the payment of postage to the United States Postal Service." *Regents*, 485 U.S. at 591, 108 S.Ct. at 1407.

ness. The Court simply held that the union's efforts to organize employees into a bargaining unit did not relate to the current business of the university and thus did not come within the exception.

The Fort Wayne case is distinguishable from *Regents*. Unlike the union in that case, the Fort Wayne Education Association serves as the exclusive bargaining representative for the school district's employees. The teachers union argues that its business as exclusive representative *is* the school corporation's business also, thus bringing the union correspondence within the "letters-of-the-carrier" exception. This court disagrees, however, and finds that this distinction has no significance for purposes of the Private Express Statutes.

In the only other Supreme Court case addressing the "letters-of-the-carrier" exception, *United States v. Erie R. Co.*, 235 U.S. 513, 35 S.Ct. 193, 59 L.Ed. 335 (1915), the Court held that the specific letters at issue fell within the scope of the exception because "[t]hey were written by an employee of the [carrier] in his official capacity and addressed to other employees in their capacities as representaives of the [carrier]." *Regents*, 485 U.S. at 597, 108 S.Ct. at 1409-10.

This court holds that the "letters-of-the-carrier" exception—read narrowly, as the Supreme Court counsels—does not countenance an employer's delivery through its in-house mail system of labor union correspondence addressed to union members. This result follows in this case because a teacher's role as school corporation employee is different from his capacity as dues-paying member of the local teachers union. The two organizations are separate entities; their functions and interests are distinct; they are not the same business. Although the affairs of the school corporation and the union necessarily overlap—or, are "related"—more than mere "relatedness" is contemplated under *Erie*. The arbitrator's judgment permitting the school corporation to carry union correspondence

to union members without the payment of postage is thus contrary to federal law.

This court will not undertake to resolve whatever state law questions remain. Whether the collective bargaining agreement—as interpreted—nevertheless requires the school corporation to deliver the association's mail and pay appropriate postage thereon is an issue properly left to a state court of competent jurisdiction.

The motions of the Postal Service and the Fort Wayne Community Schools for summary judgment are hereby GRANTED. IT IS SO ORDERED.

## APPENDIX D

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

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Case Number: 51 390 0602 88 B

In the Matter of the Arbitration between

FORT WAYNE EDUCATION ASSOCIATION

and

FORT WAYNE COMMUNITY SCHOOLS

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### AWARD OF ARBITRATOR(S)

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated , and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

The grievance is sustained in part and denied in part. The Schools are directed to rescind its August 18, 1988, memo to the extent it includes or affects the Association and to resume pickup and delivery service of the Association's interschool mail pursuant to the guidelines set forth in this Opinion.

/s/ Warren E. Eagle
WARREN E. EAGLE
Arbitrator

Date: July 7, 1989

STATE OF ILLINOIS )
ss:
COUNTY OF COOK )

On this 7th day of July, 1989, before me personally came and appeared Warren E. Eagle, to me known and to me known to be the individual(s) described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ Reatha S. Henry

AMERICAN ARBITRATION ASSOCIATION

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Case Number 51 390 0602 88 B

In The Matter of the Arbitration Between

FORT WAYNE EDUCATION ASSOCIATION

and

FORT WAYNE COMMUNITY SCHOOLS

---

Grv.: Termination of Mail Pickup and Delivery

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WARREN E. EAGLE was selected as Arbitrator, pursuant to the provisions of the Agreement between the parties. The hearing was held on May 11, 1989, in Fort Wayne, Indiana.

The parties filed post-hearing briefs. The hearing was declared closed on June 17, 1989.

*Appearances*

For the Fort Wayne Education Association:

Mr. Marvin O. Ross
Grievance Representative for the FWEA
909 N. Coliseum Blvd.
Suite 107, Stoller Building
Fort Wayne, Indiana 46805

Mr. Tom W. Richardson

Mr. Dan Kellum

For the Fort Wayne Community Schools:

Mr. William L. Sweet, Jr., Esq.
215 East Berry Street
P.O. Box 2263
Fort Wayne, Indiana 46801

Mr. Tom Harris

Ms. Dana Wichern

Dr. Richard L. Gardner

## OPINION AND ORDER

### ISSUE

Whether the Schools' pickup and delivery of the Association's interschool mail, pursuant to the collective bargaining agreement between the parties, violates the Private Express Statute as interpreted by the United States Supreme Court in *Regents of the University of California v. Public Employment Relations Board et al.*.

### FACTS

The facts are undisputed. During the 1972-73 school year, the Fort Wayne Education Association (the "Association") became the exclusive bargaining agent for the classroom teachers of the Fort Wayne Community Schools (the "Schools"). The parties entered into their first collective bargaining agreement, effective August 15, 1972. This occurred before the July 1, 1973, effective date of Public Law 217 ("P.L. 217"), the amendment to Title 20 of the Indiana Code concerning collective bargaining between school corporations and certified employees.[1] Article IV, Section B, of that Agreement provided that "[T]he Association shall be provided a separate mail box in each school. Interschool mail delivery shall be provided to the Association by the Board" (Assn. Ex. 1). Article III, Paragraph D ("Paragraph D") of the 1986-89 Master Contract ("Contract") between the parties provides (emphasis added):

> The Association shall be provided a separate mailbox in each school. *The Association's interschool mail shall be delivered by the Board. The Association's office shall be a regular stop on the Board's regularly scheduled interschool mail delivery system.* (Jt. Ex. 1).

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[1] Section 7(c) of P.L. 217 allows the school employer or the school employee organization to bring suit for specific performance and/or breach of performance of a collective bargaining contract in any court having jurisdiction thereof.

The Board lived up to its Paragraph D obligation until August of 1988.[2] On or about August 18, 1988, the Schools, on advice of its counsel, advised the Association (and fifty-nine other individuals and organizations) that "as a result of the Supreme Court ruling in *Regents of the University of California System v. Public Employment Relations Board* . . .[3] [b]eginning Monday, August 29, 1988, the [Schools'] warehouse Delivery Service [would] discontinue delivery of all mail except that dealing with the current business of Fort Wayne Community Schools" (*see* Board Exhibit 4). Prior to this official notification, the Schools and the Association discussed suitable alternatives; however, none of the alternatives were satisfactory to the Association. After August 29, the Schools continued to use its interschool mail to make deliveries of its mail to the Association's office; however, the Schools did not pick up or deliver the Association's mail.

On September 13, 1988, the Association filed a grievance alleging that the Schools' action violated Article I and Article III of the Contract and requesting, *inter alia*, that the Schools be directed (1) to rescind its August 18, 1988, memo to the extent it includes or affects the Association, and (2) to resume delivery service of the Association's interschool mail (Jt. Ex. 2). The Schools denied the grievance. The Association appealed the grievance through the various steps of the grievance procedure contained in the Contract, which procedure culminated in this arbitration proceeding.

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[2] Association Exhibits 2-6 are examples of the types of Association mail the Schools picked up and delivered pursuant to Paragraph D. All of these exhibits are unaddressed Association flyers announcing workshops, meetings, and events of educational significance, and Association newsletters.

[3] 56 LW 4334 (1988).

## PERTINENT CONTRACTUAL PROVISIONS

### *Article I*

### *Recognition*

A. The Board recognizes the Association as the sole and exclusive bargaining agent for the classroom teachers . . . .

### *Article III*

### *Association and Teacher Rights and Responsibilities*

* * *

D. The Association shall be provided a separate mailbox in each school. The Association's interschool mail shall be distributed by the Board. The Association's office shall be a regular stop on the Board's regularly scheduled interschool mail delivery system.

### *Article XXIX*

### *Effect of Master Contract*

* * *

C. Should any article or portion thereof be declared illegal by a court of competent jurisdiction or be in conflict with any state or federal statute or regulation that has the effect of statute, such article or portion thereof shall be deleted from the contract to the extent it violates the law, but the remainder of the contract shall remain in full force and effect.

## DISCUSSION

Article XXIX, Section C, of the Contract allows the Schools to unilaterally modify the Contract when an article or part thereof is declared illegal by a court of competent jurisdiction or is found to be in conflict with a federal statute. With respect to the last two sentences of Paragraph D, the parties herein were not parties in

*Regents* and no article or portion of the Contract has been declared illegal by any court of competent jurisdiction.[4] Moreover, the Arbitrator believes that under the facts of this grievance the letters-of-the-carrier exception to federal Private Express Statute (the "Statute"), 18 U.S.C. Sec. 1693-1699, U.S.C. Sec. 601-606, as interpreted in the *Regents* decision, applies to a certain extent to the Schools' carriage of the Association's interschool mail.

*Regents* is distinguishable in two major respects from the matter before the Arbitrator: (1) in *Regents* the Union that was requesting to use the University's internal mail system to carry unstamped letters to University employees was not the exclusive bargaining agent of any of the University's employees, but instead was attempting to organize the University's employees; and (2) in *Regents* no collective bargaining agreement existed between the University and the employees that provided for carriage of the Union's interschool mail. Under those facts, the Supreme Court held first that the letters-of-the-carrier exception to the Statute, which permits the private carriage of letters that "relate . . . to the current business of the carrier" did not encompass the letters involved in the case. *Regents*, 56 LW at 4335. The Court stated:

> The letters relate to the Union's efforts to organize certain of [the University's] employees into a bargaining unit. This is a subject in which [the University] certainly is interested, but it is also a subject

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[4] The parties could have filed a declaratory judgment action seeking an interpretation of Paragraph D vis-a-vis the Private Express Statute. Alternatively it appears that the Schools, the Association, or both could have filed a declaratory judgment action, pursuant to Section 7(c) of P.L. 217, in any court having jurisdiction in order to determine the rights of the parties with respect to Paragraph D. Clearly, a judicial judgment in favor of the Schools' interpretation of *Regents* would have provided the Schools with a basis for unilaterally deleting the last two sentences of Paragraph D.

> which can be accurately described only as the Union's current business, not [the University's].

*Id.*

Because the facts in *Regents* were clearly not amenable to application of the letters-of-the-carrier exception, the Court neither addressed nor delineated several issues that would have been helpful in rendering a decision under our facts. For example, after noting that "the face of the Statute requires that the letters 'relate' to the 'current business of the carrier,' " the Court stated that "precisely what constitutes a carrier's 'current business' is not further described." *Id.* Further, after concluding that the letters-of-the-carrier exception is narrower than the Union argued, the Court stated:

> Whether or not it can be read to include a requirement that the letters be written by or addressed to the carrier, a question we need not reach, it is at least limited to 'business of the carrier' that is closer to the carrier's own affairs than the letters involved here.

*Id.* at 4336.

The Court then addressed whether the private-hands exception to the Statute applied to the Union's letters.[5] The Court interpreted the private-hands exception as "not authorizing carriage pursuant to a business relationship," finding that " 'compensation' has been read to encompass the non-monetary consideration that is implicit in a business relationship." *Id.* at 4337. The Court held that the Union's letters did not fall within that exception either.[6]

The Arbitrator concludes that the instant grievance does not fall within the private-hands exception. How-

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[5] The private-hands exception provides that "[t]his chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation."

[6] The dissent was solely based upon its interpretation of the private-hands exception.

ever, because the Court in *Regents* failed to explain what kind of mail "relate(s) . . . to the current business of the carrier" or decide whether the letters must be written by or addressed to the carriers, the Arbitrator believes that the facts that distinguish *Regents* from our case—that the Associaton is the exclusive bargaining agent for the Fort Wayne teachers and that the contract provides for the pickup and delivery of Association mail —warrants a conclusion different from *Regents* with respect to the letters-of-the-carrier exception. The Arbitrator finds that subjects such as the administration and enforcement of the collective bargaining agreement, education or education-related workshops, seminars, information and materials, and non-education matters concerning the teachers for which the schools receive benefits relate to the current business of the carrier. However, pursuant to *Regents,* the Arbitrator also finds that Association mail notifying the teachers of Association meetings and workshops does not relate to the current business of the Schools, but is instead the current business of the Association.

In conclusion, the Arbitrator believes that the School's unilateral deletion of the last two sentences of Paragraph D swept with too broad a brush. Under our facts, Paragraph D was not wholly in conflict with the Private Express Statute. Accordingly, the Arbitrator holds that interschool mail delivery permissible under the letters-of-the-carrier exception to the Private Express Statute, as interpreted by the Supreme Court in *Regents,* include:

1. Letters specifically addressed to the Association, its agents and representatives, by the Schools, its agents and representatives, and letters addressed to the Schools, its agents and representatives, by the Association, its agents and representatives, having anything whatsoever to do with (a) administration and enforcement of the collective bargaining agreement, (b) education or education-related workshops, seminars, information

and materials, and (c) non-education matters concerning the teachers for which the Schools receive benefits; and

2. Flyers and other such non-specifically addressed materials which relate to 1(a), (b) and (c) above.

Interschool mail delivery which is not permissible under the Private Express Statute, as interpreted by the Supreme Court in *Regents*, include letters or flyers from the Association to its members concerning Association business.

AWARD

The grievance is sustained in part and denied in part. The Schools are directed to rescind its August 18, 1988, memo to the extent it includes or affects the Association and to resume pickup and delivery service of the Association's interschool mail pursuant to the guidelines set forth in this Opinion.

/s/ Warren E. Eagle
WARREN E. EAGLE
Arbitrator

Date: July 7, 1989

## APPENDIX E

## AMERICAN ARBITRATION ASSOCIATION

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Case Number 51 390 0602 88 B

In The Matter of the Arbitration Between

FORT WAYNE EDUCATION ASSOCIATION
*Grievant*,

and

FORT WAYNE COMMUNITY SCHOOLS
*Respondent*.

---

Grv.: Termination of Mail Pickup and Delivery

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## CLARIFICATION OF AWARD

Pursuant to the FWEA's Petition for Clarification of Award Pursuant to I.C. 34-4-2-10, the Arbitrator holds that interschool mail delivery permissible under the letters-of-the-carrier exception to the Private Express Statute include:

1. Letters specifically addressed to the Association, its agents, representatives, and members, from the Schools, its agents and representatives, letters addressed to the Schools, its agents and representatives, from the Association, its agents, representatives, and members, and letters addressed to Association agents, representatives, and members from the Association, its agents and representatives, having anything whatsoever to do with (a) administration and enforcement of the collective bargaining agreement, (b) edu-

cation or education-related workshops, seminars, information and materials, and (c) non-education matters concerning the teachers for which the Schools receive benefits; and

2. Flyers and other such non-specifically addressed materials between any of the entities, their agents, representatives, or members, described in 1 above which relate to 1(a), (b) and (c) above.

The remainder of the Opinion and Award, including the last paragraph on page 8 concerning interschool mail delivery impermissible under the letters-of-the-carrier exception, remains the same.

/s/ Warren E. Eagle
WARREN E. EAGLE
Arbitrator

Date: August 14, 1989